

STATE OF MICHIGAN
COURT OF APPEALS

ANNETTE SURANT, Personal Representative
Of the Estate of RYAN DONOVAN SURANT,

Plaintiff-Appellee,

v

HEARTLAND WISCONSIN CORPORATION
and KLEE CONSTRUCTION,

Defendants,

and

SHORE POINT BUILD & RENOVATE,

Defendant- Appellant.

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this negligence case, defendant appeals by leave granted the trial court's order denying in part defendant's motion for summary disposition. We affirm.

I. FACTS

This action arises out of the accidental death of plaintiff's decedent, 19-year-old Ryan Surant. Surant was electrocuted on November 5, 2003 at a construction site in St. Clair Shores, Michigan where defendant-appellant Shore Point Build & Renovate (Shore Point) contracted to build a custom home. Shore Point, as a general contractor, subcontracted the rough construction of the home, including erecting the walls, roof and trusses, to Klee Construction Company¹ (Klee). Klee employed Surant and had a prior relationship with Shore Point serving as the

¹ Klee Construction Company is not a party to this appeal.

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carpentry contractor on three prior homes. Anthony Bellestri, Shore Point's owner and only employee, testified that he also hired the following trades to complete the project: BRS to clean up the land, Opper for excavating, Formspec to complete the walls and foundation, and Aqua Plumbing.

Before the day of the accident, Klee employees had been working at the site approximately 10 days. Klee employed six carpenters who were working at the time of the accident on the job site, and also employed at least two laborers, including Surant. On the day of the accident, Bellestri was on site to monitor progress and inside the house when the accident occurred. Bellestri testified that he visited the site 10 to 20 times between the digging of the basement and the accident.

Joseph Klee, the principal of Klee Construction Company, testified that he had several discussions with Bellestri regarding the safety of the power lines above the construction site. Klee also raised concerns with Bellestri regarding a large puddle of water covering about 30 percent of the property in front of the home which was caused by a broken water main. However, Bellestri denies discussing safety issues and asserts that Klee was responsible for the safety of the site.

The trusses for the home were delivered to the construction site for Century Truss by a lumber company. Plaintiff alleges that as a result of the water in front of the home, the trusses were delivered closer to the power lines and further away from the house. Surant was attaching the cable from the crane to the building trusses in order to lift them to the second floor of the home. After making contact with the power lines located above the site, the steel cable from the crane became energized and fatally electrocuted Surant. The crane was leased by Klee, brought to the site by a Klee employee, and at the time of the accident was operated by Klee foreman Edward Spaccarotelli. Spaccarotelli also died from electrocution after coming to Surant's aid.

Representatives of Surant's estate filed this action in the circuit court alleging the following: inherently dangerous activity; negligent retention/supervision of an independent contractor; negligence and gross negligence of defendants in failing to provide a safe work environment; and counts of negligence and gross negligence against Shore Point, Klee, and Heartland Wisconsin.² Shore Point filed its motion for summary disposition alleging that it was not liable under any of the pled causes of action. The circuit court granted the motion with respect to claims of inherently dangerous activity and negligent supervision of the independent contractor. Summary disposition was denied on the claim of failure to provide a safe work environment. The circuit court determined questions of fact existed under the claim against Shore Point with respect to the "common work area" doctrine and foreseeability of the on-site safety issues. Defendants filed for leave to appeal with this Court, which we granted.

II. STANDARD OF REVIEW

² Heartland Wisconsin is the company who leased the crane to Klee Construction.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

III. COMMON WORK AREA EXCEPTION

Defendants contend that the trial court erred in denying defendant's full motion for summary disposition because plaintiff failed to establish an exception to the rule that a general contractor is not liable to the employees of an independent contractor. As a general rule, a contractor may not be held liable for the negligence of independent subcontractors and their employees. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48-49; 684 NW2d 320 (2004). The basic exception to this rule is the common work area exception enunciated in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds, *Hardy v Monsato Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982). *Ormsby, supra* at 49. According to *Funk*, for a general contractor to be held liable, a plaintiff must show that (1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. *Ormsby, supra* at 54-55; citing *Funk, supra* at 104. The Court in *Ormsby* illuminated an important distinction between situations where each subcontractor is responsible for employee safety and where the general contractor is responsible. The footnote reads in part:

“This Court has previously suggested that the Court’s use of the phrase “common work area” in *Funk, supra*, suggests that the Court desired to limit the scope of a general contractor’s supervisory duties and liability. We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were subject to the same risk or hazard. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will ‘render it more likely that the various subcontractors... will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.’” *Ormsby, n 9 supra; Hughes v PMG Building*, 227 Mich App 1, 8-9; 574 NW2d 691 (1997) quoting *Funk, supra* at 104.

The first issue in this case is whether the construction site was a common work area such that it was shared by more than one subcontractor. Defendants argue that a common work area was not created at the construction site because the only employees present on the day of the accident were employees of Klee Construction. However, the common work area doctrine does

not require “multiple subcontractors working on the same site at the same time,” rather “that the employees of two or more subcontractors eventually work in the same area.” *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 75; 600 NW2d 348 (1999)³ quoting *Philips Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994).

Given the aforementioned law, the key issue is whether workers of more than one subcontractor will eventually be working in the area of the construction site where decedent was killed. This case is analogous to *Bohnert v Carrington Homes*, decided with *Groncki v. Detroit Edison*, 453 Mich 644; 577 NW2d 289 (1996). In that case, plaintiff’s decedent was injured at a home construction site. No one was present at the time of the accident. The decedent was electrocuted in the course of delivering masonry supplies when the boom from his delivery truck hit an overhead electrical wire. *Id* at 652-653. The accident in *Bohnert* occurred on the main driveway of the construction site *Id* at 664. The Court was willing to accept the possibility that “most, if not all, the workers and their equipment passed along [this] driveway and directly beneath the power line.” *Id*. Therefore, as to Carrington Homes, our Supreme Court found summary disposition inappropriate, holding that questions of fact existed as to the presence of both a common work area and a readily observable risk under the second and third elements of *Funk*. *Id* at 662-665.

In this case, plaintiff established the existence of “readily observable and avoidable dangers” (*See Funk, supra*) via photographic evidence of the construction site and testimony. A large puddle of water covered about 30 percent of the property in front of the home and Detroit Edison power lines ran along the road at the edge of the construction site. The water obstructed the workers’ access to the home, and therefore, placed the workers equipment in close proximity to the power lines. Plaintiff’s claim that these conditions “created a high degree of risk to a significant number of workmen” is supported by Bellestri’s testimony that he also hired at least three other subcontractors in addition to Klee to complete the project.⁴ Our review of the record shows that it is unclear whether the lumber company was delivering the trusses at the time of the electrocution.

Given that various subcontractors either worked on, or were scheduled to work on, the common project of constructing the home, they might have been subjected to the same risk of danger that ultimately resulted in decedent’s death. In light of the evidence presented by plaintiff, it is reasonable to conclude, as the Supreme Court did in *Groncki*, that the area in front of the home where decedent was electrocuted was a central location that the workers of more

³ *Candelaria v BC General Contractors*, 252 Mich App 681; 653 NW2d 630 (2002)(*Candelaria II*) addresses the issues of negligence and proximate causation rather than the issue of general contractor and subcontractor liability in common work areas. The *Candelaria II* case stands for the proposition that “an unreasonable risk of harm does not arise from activity that is fairly routine and when the employer has no reason to anticipate a new risk created by the negligent performance of the activity.” *Id*. at 688. Consequently, *Candelaria II* maintains this proposition cited in *Candelaria I*.

⁴ The individuals who delivered the trusses to the site are also considered subcontractors in light of *Bohnert, supra*. In *Bohnert* the Supreme Court found a material question of fact existed with respect to the responsibility of Carrington, the general contractor, for the electrocution of Bohnert, a delivery man. *Id* at 665.

than one subcontractor might eventually be traveling or working. At this stage in the litigation of summary disposition, the Court cannot say with certainty that other workers would not be exposed to the water and power line hazards. Therefore, we are persuaded that a genuine issue of material fact exists as to whether a significant number of employees were exposed to risks while working at the site under the third element of the *Funk* test.

IV. LEGAL FORESEEABILITY OF ACCIDENT

Our holding that a genuine issue of material fact exists as to whether the construction site was a common work area requires us to address defendant's arguments on foreseeability. Under *Ormsby, supra*, only when the four-part "common work area" test set forth in *Funk, supra* is satisfied may an injured employee of an independent contractor hold a general contractor liable for that contractor's alleged negligence. *Ormsby, supra* at 48. Further, "when all of the elements of *Funk* are satisfied, a general contractor is presumed to have been able to foresee that readily observable and avoidable risks will lead to accidents and injuries." *Groncki, supra* at 665.

When evaluating whether to "impose a duty courts must evaluate several factors among which are the relationship of the parties, the foreseeability of harm, and the nature of the risk itself." *Buczowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992). Defendants argue that the trial court erred in denying defendant's full motion for summary disposition because no genuine issue of material fact exists as to whether the contact with the power line by Surant was legally foreseeable as a "readily observable and avoidable danger" under *Funk*.

Foreseeability requires that a reasonable person "could anticipate the likelihood that a particular event would occur under certain conditions," and that such an event would "pose some sort of risk of injury to another person or his property." *Samson v Sagnia Professional Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975). Upon viewing the facts in favor of the non-moving party, and taking into consideration the testimony of conversations between Klee and Bellestri, material questions of fact exist whether Bellestri was aware of the hazards posed by the proximity of the power lines combined with the water impeding access to the home.

Plaintiff briefly alludes to the issue of whether Shore Point may avoid liability on the grounds that the conditions giving rise to the injury were open and obvious. In light of our Supreme Court's decision in *Ghaffari v Turner Construction Co*, 473 Mich 16; 699 NW2d 687 (2005), however, this argument has no application in a claim brought under the "common work area" doctrine. The trial court did not err in denying defendant's motion for summary disposition.

Affirmed.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio